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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF ILLINOIS,

Petitioner,

vs.

ANTHONY CRANE,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First District, Fifth Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the information possessed by a law enforcement agency, as a whole, provides probable cause to arrest an individual under the Fourth Amendment, even though this information was neither communicated to the arresting officers nor to the radio dispatcher upon whose order the officers relied.

Whether a good faith exception to the exclusionary rule should be imposed where arresting officers reasonably relied on police headquarters' radio dispatch to stop respondent, and where headquarters as a whole possessed probable cause.

Whether the State is entitled, as a matter of law, upon request, to a hearing on attenuation regarding any evidence which would be excluded where a trial court's denial of a motion to quash and suppress evidence was overturned on appeal by a reviewing court.

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OCTOBER TERM, 1993

STATE OF ILLINOIS,

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Petition for Writ of Certiorari to the Appellate Court of Illinois, First District, Fifth Division

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Appellate Court of Illinois, First Judicial District, Fifth Division, which was entered May 28, 1993.

OPINION BELOW

The order of the Appellate Court of Illinois, First Judicial District, Fifth Division, is reproduced in Appendix A to this Petition.

JURISDICTION

The order and judgment of the Appellate Court of Illinois, First Judicial District, Fifth Division, were entered on May 28, 1993. On October 6, 1993, the Illinois Supreme Court denied a Petition for Leave to Appeal. This Petition for a Writ of Certiorari is filed within 90 days of that date. The decision of the Appellate Court of Illinois, First Judicial District, Fifth Division was explicitly based on federal constitutional law, in particular on the Fourth and Fourteenth Amendments. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged with first degree murder by indictment number 90 CR 5863. (C. 23) Respondent was tried in the Circuit Court of Cook County, Illinois and was found guilty by jury verdict of first degree murder and aggravated arson. (C. 73-74) Respondent waived the jury for the death penalty phase of trial. The lower court sentenced respondent to a term of natural life imprisonment. (C. 107)

On October 17, 1989, respondent went to a tavern where he once worked, doused the owner, Mr. William McHugh, with gasoline and then set him on fire by igniting the gasoline with a match. Mr. McHugh died of thermal burns over 95% of his body. Respondent committed the arson murder because the victim had named him to a mutual friend and to the police as one of three people who had hit him on the head and robbed him two days before. Respondent was arrested and gave several statements to the police confessing to the robbery and implicating himself in the murder of Mr. McHugh. The officer who took respondent's confession was Detective Timothy O'Meara.

Prior to trial, respondent filed pre-trial motions to quash arrest and suppress evidence. (C. 14-20) Respondent alleged in these motions that the police who effected the warrantless arrest of respondent had insufficient information to arrest him, that they had no probable cause, and that the subsequent fruits of the arrest, i.e., his statements, should have been suppressed.

At the hearing on the motion, the People established that the two arresting officers, David Sepulveda and Robert Graeber were assigned to the Eighth District Tactical Unit on October 31, 1989. While on duty, they received an assignment from their dispatcher to look for a man wanted for robbery and arson murder. (R. 54-55) They were given a description of the wanted offender as "Tony," a male white, driving a blue station wagon with no front fenders. (R. 55, 63) The dispatcher directed the officers to the area of 3150 W. 64th Street, in Chicago, Illinois.

The information that respondent was wanted had been developed by Detective Timothy O'Meara who had spoken to Raymond Kurecki, a close friend of the victim. Mr. Kurecki informed the police that Mr. McHugh had been robbed by respondent and two others. (R. 90) Mr. Kurecki knew respondent personally, and had been told by the victim that one of the people who had robbed him was Tony, who used to work for him. (R. 93)[1] Mr. Kurecki provided the police with the name "Tony," a description of respondent's car and the license plate number (NX 1629). (R. 94) Detective O'Meara traced the license plate through vehicle records and learned that the owner of the car was Anthony Crane. (R. 94) Detective O'Meara obtained a photograph of the respondent and showed it to Mr. Kurecki, who made a positive identification of Anthony Crane as the person he knew as "Tony," whom the victim had named as the person who committed the robbery. (R. 93-95) After obtaining this information, Detective O'Meara tried to locate respondent, but was unable to so do. (R. 98)

On October 31, 1989, while touring the area at the direction of their dispatcher, Officers Graeber and Sepulveda located a blue Toyota station wagon, which was missing its front fenders, blocking an alley at 3045 W. 60th Street. (R. 56) The officers put the car under surveillance for 15 to 20 minutes and waited for the driver to return. When no one returned, the officers began to canvass the adjacent building, looking for the

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[1] The victim also gave this information to the police from the Eighth Police District, on October 16, 1989, the day after the robbery. (R. 1062-1063)

owner of the car. (R. 57) In response to their inquiries, a man informed them that the car was "Tony's" and that he would get him. (R. 59) Anthony Crane came out into the hallway and was asked about the car blocking the mouth of the alley. He admitted that the car was his. (R. 70) Respondent was asked for his driver's license, and produced a ticket on which he was driving in lieu of a license. (R. 17) Respondent appeared to be nervous. (R. 73)

The two officers and Anthony Crane were standing together, in a triangle, with the officers in front of respondent. (R.70, 73-74) When respondent opened his wallet to produce his identification, Officer Graeber observed, in plain view, a small folded packet of cocaine, 1/2 inch by 1 and 1/2 to 2 inches, commonly known as a pony pack. (R. 60, 75) Officer Graeber responded to his observation by reaching into the wallet and removing the drugs. (R. 78) Officer Sepulveda saw his partner's hand go into the wallet, and saw it come out holding the drugs. Officer Sepulveda's observation was made simultaneously with his partner's action. (R. 79) Both officers recognized the packaging and contents and believed the substance to be cocaine. (R. 59-60) The substance later tested positive for cocaine. (R. 1069)

After a hearing on the motions, the trial court found that the police knew that a crime had been committed and that respondent had been named as a participant. (R. 137) The trial court found that the police were armed with a photographic identification of a suspect, and with information about a vehicle which led to an address. (R. 137) The trial court found that the police saw the cocaine in respondent's wallet and that there was probable cause

to arrest Anthony Crane for possession. (R. 138) The trial court specifically found the testimony of the police to be believable. (R. 139)

The Illinois Appellate Court, First Judicial District, Fifth Division held that the People failed to show the source of the information which caused the dispatcher to send the arresting officers to look for respondent, and that because Officers Sepulveda and Graeber were not acting in concert with Detective O'Meara, that the information gleaned by Detective O'Meara could not be imputed to the arresting officers to provide them with probable cause to arrest.

The Illinois Appellate Court also held that an officer who sees contraband in plain view must testify, and that his partner may not offer hearsay evidence as to what the first officer saw.

Finally, the Appellate Court found that the State is not entitled to a hearing on attenuation because the State failed to tell the Appellate Court what evidence *dehors* the record it could adduce at a hearing on attenuation to establish that respondent's confession was attenuated from his arrest.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I.

THE MIXED ASSORTMENT OF PRINCIPLES THAT PRESENTLY GOVERN THE OPERATION OF THE "COLLECTIVE KNOWLEDGE DOCTRINE" FAIL TO PROVIDE LAW ENFORCEMENT OFFICERS WITH CLEAR AND UNEQUIVOCAL GUIDELINES FOR DETAINING AND ARRESTING SUSPECTS.

The conduct of arresting officers Sepulveda and Graeber was objectively reasonable, since the information possessed by the Chicago Police Department, as a whole, overwhelmingly provided probable cause to arrest Anthony Crane at the time of his arrest, even though this information was neither communicated to the arresting officers nor to the radio dispatcher upon whose order the officers relied. Since the Fourth Amendment protects "the right of the People to be secure in their persons . . . against unreasonable searches and seizures" and the officers were acting reasonably when they arrested respondent, there was no violation of the Fourth Amendment. Application of the "exclusionary rule" to situations in which all interdepartmental information is not communicated to every member of a police force in a large metropolitan area or a chain of such communication is not established, makes a mockery of the Fourth Amendment and thus has reached its most illogical conclusion.

This Court, on two occasions, has recognized that an officer who seizes or stops a suspect need not know all the facts and circumstances which justify the stop or seizure, as long as the officer is responding to a directive

that is based on facts sufficient to authorize the stop or the seizure. *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) and *United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). Although this Court embraced this common sense principle, now known as the collective knowledge doctrine[2], it did so without setting forth the rudimentary rules that are to trigger and govern the doctrine's application. As a result, both state and federal courts have been faced with the task of defining the nature and scope of the collective knowledge doctrine. Predictably, an alarming conflict has manifested concerning the fundamental principles that should govern the operation of the doctrine. In fact, the opinion rendered by the Appellate Court of Illinois adopts a mixture of overly restrictive principles that are presently espoused by a majority of both state and federal courts. However, these limiting rules defeat the function of the collective knowledge doctrine by frustrating effective law enforcement and have resulted in application of the "exclusionary rule" where there has been no violation of the Fourth Amendment whatsoever. This Court should embrace this opportunity to resolve the current conflict over the principles that govern the application of the collective knowledge doctrine by providing police officers with clear and unequivocal guidelines for detaining and arresting suspects.[3]

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[2] The process of imputing the knowledge of one officer onto another is also known as the "fellow officer" rule or the "imputed knowledge" doctrine.

[3] This Court has repeatedly acknowledged the importance of providing "clear and unequivocal" guidelines to the law enforce-

(continued...)

A.

Where A Law Enforcement Agency Collectively Possesses Probable Cause To Arrest An Individual And A Police Officer Relies On A Department Radio Dispatch To Arrest That Individual, The Arrest Is Objectively Reasonable And Does *Not* Violate The Fourth Amendment Even Though The Information Is Neither Communicated To The Arresting Officer Nor To The Radio Dispatcher.

The majority of the courts have taken an unnecessarily restrictive position in defining the scope and nature of the collective knowledge doctrine which furthers no specific constitutional principle but, instead, hinders effective law enforcement, particularly in major metropolitan areas. These overly restrictive principles can be divided into three basic categories: 1) the requirement that facts supporting a seizure be traced to a specific individual; 2) the requirement that the officers involved are "working in concert" or 3) the requirement of proving a chain of communication between the source of the information and the seizing officer.

The *Hensley* court determined that law enforcement agents should be permitted to objectively rely on a police bulletin to detain a suspect issued by their superiors or fellow officers. *Hensley*, 105 S.Ct. at 682. The only limit set by this Court was that there be sufficient evidence to justify the stop. Thus, the logical relevant question following *Hensley* should not have been whether the dis-

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[3] (...continued)
ment profession. *Arizona v. Roberson*, 486 U.S. 682, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988); *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 489, 112 L.Ed.2d 489 (1990); and *California v. Acevedo*, 500 U.S. ___, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

patcher or the person who initiated the communication himself knew of the information justifying the stop or alternatively, the information that would supply probable cause for an arrest, but, rather, whether the information or probable cause existed at the time of the stop or the seizure. However, *Hensley* has not been so interpreted or applied.

Many courts adopt the restrictive criterion that the information supporting the seizure be traced back to a specific individual. For instance, quite a few courts require that the dispatcher who transmitted the request possess the information. As determined by the Supreme Court of Minnesota, the admissibility of evidence uncovered during a stop is dependent on whether the dispatcher, who issued the message to the deputies, was in possession of facts sufficient to justify the stop. *Olson v. Commissioner of Public Safety*, 371 N.W.2d 552, 555-56 (Minn. 1985) Similarly, the Oregon Appellate Court concluded that the appropriate inquiry is whether the information possessed collectively by the trooper and the dispatcher gave rise to reasonable suspicion that defendant had committed a crime. *State v. Black*, 80 Or. App. 12, 721 P.2d 842, 846 (Or. App. Ct. 1986)[4] However, the requirement that the dispatcher or any single individual possess the requisite information needed to justify a

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[4] See also *State v. Bruce*, 779 P.2d 646, 650-51 (Utah 1989); *State v. Holmes*, 28 Ohio App. Ct. 3d 12, 501 N.E.2d 629, 634-35. (Ohio App. 1985) ("It is well settled that the absence of complete knowledge on the part of those who act in objective reliance upon a broadcast, flyer, or bulletin will not serve as a constitutional impediment as long as the officer issuing the information has the requisite knowledge to establish the justification for the arrest or detention.")

seizure is an unrealistic burden in a large metropolitan police department since law enforcement agencies are often divided into specialized units and officers work in ever changing shifts. Furthermore, the absurdity of the requirement that the individual dispatcher be in possession of the information justifying a seizure is highlighted by the realization that the dispatcher is a mere conduit of information, and often a civilian who is untrained in field work.

Other courts restrictively apply the collective knowledge doctrine to situations where the officers are "working in concert."[5] Still other courts require that the officers participating in the investigation and arrest be "working in *close* concert."[6] It is unclear whether the concept of "working in close concert" differs in any way from the concept of "working in concert." Regardless, neither concept is supported by the decisions of this Court. To the contrary, the *Whiteley* and *Hensley* decisions indicate that a mere response to a directive of another officer trig-

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[5] *People v. Frenner*, 191 Ill. App. 3d 801, 806, 548 N.E.2d 147 (2nd Dist. 1989) (where officers are "acting in concert" in investigating a crime or possible crime, probable cause to arrest or reasonable suspicion to stop can be established from all the information collectively received by the officers even if not known to the officer initiating the stop); *United States v. Lomas*, 706 F.2d 886 (9th Cir. 1983) (An individual officer in a coordinated investigation need not have personal knowledge of all the relevant facts to effect an arrest. It is sufficient if the pool of objective data possessed by the group of agents "acting in concert" supplies the requisite probable cause.)

[6] *Commonwealth v. Wooden* 13 Mass. App. Ct. 417, 433 N.E.2d 1234 (Mass. App. Ct. 1982) (imputing the knowledge of one officer to another where both were working in concert and within arm's reach of each other and of suspects)

gers the application of the collective knowledge doctrine. In *Whiteley*, the arresting officer simply responded to a radio bulletin transmitted by a neighboring law enforcement agency. 91 S.Ct. at 1034. This Court found a Fourth Amendment violation because the bulletin that requested the arrest of the defendant was based on a legally insufficient warrant, not because the government failed to show that the arresting officer and the officers of the issuing agency were working in concert. 91 S.Ct. at 1037. Similarly, in *Hensley*, the detaining officer responded to a "wanted flyer" distributed by another police department. The *Hensley* court found that the issuing police agency possessed reasonable suspicion to issue the flyer. 105 S.Ct. at 683-84. In making this determination, the *Hensley* court did not evaluate whether the arresting officers and the issuing police department were "working in concert." Again, the need for clear and definitive guidelines is evident.

Applying still another restrictive criterion, some courts require that a chain of communication be established before imputing the knowledge of one officer to another officer.[7] Other courts apply the collective knowledge doc-

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[7] See, *United States v. Dento*, 382 F.2d 361, 364 (3rd Cir. 1967) ("But it seems clear that if facts, sufficient upon which to base probable cause, known to the arresting officers are received through some chain of communication, that chain of information from its source to the resulting arrest must be constructed with reliable links. (cites omitted) This does not mean that the arresting officers have to know the ultimate source of their information, but only that the chain, once formed, be cohesive.") Also See, *Polk v. Williams*, 565 So.2d 1387 (Fla. App. 5th Dist. 1990) ("It is sufficient if an officer initiating the chain of communication receives information from an official source or eyewitness who, it seems reasonable to believe, is telling the truth.")

trine when there is "some degree of communication" between the source of the information and the arresting officers.[8] The requirement that the prosecution establish a chain or link of communication has transformed the collective knowledge doctrine into an unworkable mechanical rule of law. The crucial issue should not be whether there is a chain of custody of knowledge, but simply whether or not there is probable cause to seize a suspect at the time of the arrest. If there is probable cause at the time the arrest is effectuated, then the police officers' actions are objectively reasonable for purposes of the Fourth Amendment.

A minority of courts have, however, adopted the approach that conforms with the dictates of the Fourth Amendment and is the logical extension of this Court's *Hensley* and *Whitely* opinions. The Supreme Court of Colorado in the case of *Colorado Dept. of Revenue v. Kirke*, 743 P.2d 16 (Colo. 1987) held that "the [collective

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[8] *United States v. Nieto*, 510 F.2d 1118 (5th Cir. 1975) (Probable cause can rest upon collective knowledge of police, rather than solely on that of officer who actually makes arrest, when there is some degree of communication between the two.) cf. *People v. Hazelhurst*, 662 P.2d 1081, 1087 (Colo. 1983) (fellow officer failed to provide basis for detention of defendant where arresting officer had been given no information implicating defendant, even though such information was known to investigating officer); *United States v. Woods*, 544 F.2d 242, 259 (6th Cir. 1976) (superior officer's knowledge cannot be considered in determining probable cause where there is no evidence that his order was a basis for defendant's arrest); *United States v. Edwards*, 885 F.2d 377, 382 (7th Cir. 1989) ("A supervising officer's knowledge about a defendant cannot be relied upon to provide cause for his arrest where there is no evidence that such knowledge was communicated to the agents on the scene who actually made or ordered the defendant's arrest.")

knowledge doctrine] provides that an arresting officer who does not personally possess sufficient information to constitute probable cause may still make a warrantless arrest if (1) he acts upon the direction or as a result of a communication from a fellow officer, and (2) the police as a *whole*, possess sufficient information to constitute probable cause." (emphasis added) *Kirke*, 743 P.2d at 18. See also *People v. Baca*, 198 Colo. 399, 401, 600 P.2d 770, 771 (Colo. 1979), and *Williams v. United States*, 113 U.S. App. D.C. 371, 308 F.2d 326 (1962) (In a metropolitan police establishment knowledge of the organization as a *whole* can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest)

The District of Columbia embraced an equally practical approach in *Smith v. United States*, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966). The *Smith* court held that the collective knowledge of the officers can be used to establish probable cause, when the information is collectively known, even if no communication by one officer to the other occurred. The court determined the correct test to be:

> "whether a warrant if sought could have been obtained by law enforcement agency application which discloses its corporate information, not whether any one particular officer could have obtained it on what information he had individually possessed."

Smith, 358 F.2d at 835.

The *Smith* rationale has been recently adopted in *In Re: M.E.B.*, No. 90-FS-1602, 1993 D.C. App. Lexis 46 (D.C. No 90-FS-1602, decided Feb. 23, 1993). Again, the rele-

vant inquiry for Fourth Amendment purposes is whether the police agency as a *whole* that issues the police bulletin possesses the facts necessary to justify a seizure. As a result, this approach provides a more reasonable standard that complies with the Fourth Amendment and facilitates effective law enforcement.

Furthermore, the moderate approach, espoused in *Colorado Dept. of Revenue v. Kirke*, 743 P.2d 16, *Smith v. United States*, 358 F.2d 833 and *In Re: M.E.B.*, 1993 D.C. App. Lexis 46, best adheres to this Court's interpretation of the Fourth Amendment probable cause concept. Compared to the restrictive approach being followed by a majority of courts, the moderate approach establishes a compromise between the competing goals of protecting an individual's privacy and facilitating effective law enforcement. In fact, this Court's interpretation of the Fourth Amendment probable cause concept seeks:

> ". . . to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would leave law-abiding citizens at the mercy of the officers' whim or caprice."

Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). The principles that govern the collective knowledge doctrine unquestionably impact the

nature of the probable cause concept. As a result, in the context of the doctrine, the nontechnical and flexible nature of probable cause can only be preserved through the adoption of the moderate approach.

Unfortunately, the Appellate Court of Illinois has adopted a "mixture" of overly restrictive principles to define the scope and nature of the collective knowledge doctrine. Specifically, the Illinois Appellate Court concluded that in order to establish probable cause from the collective knowledge of the Chicago Police Department, the State must show (1) that the dispatcher or the source of the radio broadcast possessed probable cause; and (2) that the non-arresting officers were working in concert with the investigating officers.[9] The Illinois Appellate Court determined that there was no evidence that the dispatcher or the source of the dispatch possessed the requisite information to justify respondent's arrest. The Appellate Court also determined that because the arresting officers, Sepulveda and Graeber, were not acting in concert with Detective O'Meara of the Bomb and Arson unit, the information gleaned by Detective O'Meara could not be imputed to the arresting officers to provide them with probable cause to arrest respondent.

Clearly, the Illinois Appellate Court has adopted a mixture of overly restrictive principles that in practice render the collective knowledge doctrine unworkable in Illinois. As stated earlier, the requirement that the dis-

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[9] The appellate court also held that an officer who sees contraband in plain view must testify, and that his partner may not offer hearsay evidence as to what his partner saw. It is the People's position that this holding renders the collective knowledge doctrine inoperative. See Argument I.B. infra.

patcher possess the requisite information to justify a seizure ignores the fact that a dispatcher is often a mere conduit of information. Such a determination also promotes a highly mechanical application of the collective knowledge doctrine which could not have been envisioned by this Court. On this record, the Appellate Court's adoption of a mechanical and restrictive analysis ignores the fact that the Chicago Police Department had probable cause to arrest respondent on the date in question. The State established that on October 15, 1989, William McHugh's tavern was robbed by three men. On October 17, 1989, Mr. McHugh was doused with gasoline and set on fire at his tavern. Mr. McHugh died of thermal burns over 95% of his body. Due to the distinct nature of these crimes, the robbery was investigated by Area Three Violent Crimes and the arson murder was investigated by the Bomb and Arson unit. Area Three Violent Crimes had information that respondent had been named as the perpetrator of the robbery.

Detective O'Meara of the Bomb and Arson unit was assigned to the murder arson investigation. Detective O'Meara learned that respondent was identified as the perpetrator of the robbery by Raymond Kurecki, a private citizen who knew both the victim and respondent. (R. 90-99, 118) Mr. Kurecki informed the detective that Mr. McHugh had been robbed by respondent and two others. (R. 90) Mr. Kurecki knew respondent personally, and had been told by the victim that one of the people who had robbed him was Tony, who used to work for

him. (R. 93)[10] Mr. Kurecki provided the police with the name "Tony," a description of respondent's car and the license plate number (NX 1629). (R. 94) Detective O'Meara traced the license plate through vehicle records and learned that the owner of the car was Anthony Crane. (R. 94) Detective O'Meara obtained a photograph of respondent and showed it to Mr. Kurecki, who made a positive identification of Anthony Crane as the person he knew as "Tony," whom the victim had named as the person who committed the robbery. (R. 93-95) After obtaining this information, Detective O'Meara tried to locate respondent, but was unable to so do. (R. 98) Moreover, the detective filed a police report as of October 30, 1989, a day before defendant's arrest.

The Illinois Appellate Court's application of the "working in concert" principle ignores the fact that Detective O'Meara was the link between the two investigations. These facts illustrate the unrealistic and restrictive nature of the "working in concert" requirement rendering the necessary division of the metropolitan law enforcement agencies an impediment to the collective knowledge doctrine. Such a constrictive condition impedes effective law enforcement because it nullifies the function of the collective knowledge doctrine. Clearly, the Appellate Court's analysis disregards the crucial issue of whether the police agency as a whole possessed sufficient facts to justify a seizure.

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[10] The victim also gave this information to the police from the Eighth Police District, on October 16, 1989, the day after the robbery. (R. 1062-1063)

Although there is no question that the collective knowledge doctrine is a viable standard, the courts of this country are at odds over the scope and application of the doctrine. The disharmony which is prevalent both at the state and federal levels jeopardizes the uniform compliance with the Fourth Amendment. Since state law enforcement agencies must often cooperate with other state and federal agencies, uniform application of the Fourth Amendment and its related doctrines is imperative for effective law enforcement. As a result, the State of Illinois urges this Court to embrace this opportunity to address this federal question which has not been, but should be, settled by this Court.

B.

The Determination That An Arresting Officer's Observations Cannot be Imputed to his Partner on Hearsay Grounds Renders The Collective Knowledge Doctrine An Unworkable Principle Of Law.

In addition to adopting an overly restrictive approach in defining the collective knowledge doctrine, the Illinois Appellate Court held that an officer who sees contraband in plain view must testify, and that his partner may not offer hearsay evidence as to what the first officer saw. In essence, this holding stands for the proposition that the knowledge of an arresting officer cannot be imputed onto his partner. Such a determination paralyzes the application of the collective knowledge doctrine.

This Court abandoned the position that probable cause may only be based upon evidence which would be competent in the trial of the offense. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed 1879 (1949). Thus,

the information which would be inadmissible at trial on hearsay grounds may be used to show probable cause. In the context of the collective knowledge doctrine, the observations of an officer can be imputed onto his partner. Consequently, the exclusion of such testimony based on hearsay grounds renders the collective knowledge doctrine a mechanical and unworkable principle of law. As stated by this Court:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. The standard of proof is accordingly correlative to what must be proved."

Brinegar, 69 S.Ct. at 1310. Contrary to this position, the opinion of the Appellate Court creates a stringent and technical standard of proof which is unsupported by this Court's interpretation of the Fourth Amendment. The facts of the present case expose the stringent and technical standard of proof applied by the Illinois Appellate Court. Officers Sepulveda and Graeber received an assignment from their dispatcher to look for a man wanted for robbery and arson murder. (R. 54-55) The officers were given a description of the wanted offender as "Tony," a male white, driving a blue station wagon with no front fenders. (R. 55, 56) The dispatcher directed the officers to the area of 3150 W. 64th Street. Touring the area, the officers located the blue Toyota station wagon, which was missing its front fenders, blocking an alley at 3045 E. 60th Street. (R. 56) After placing the car under surveillance, the officers began to canvass the adjacent building looking for the owner. In response to their in-

quiries, Jim Valek informed them that the car was "Tony's" and that he would get him. (R. 59) Respondent came out into the hallway, and was asked for his driver's license. Respondent appeared to be nervous. (R. 73) According to Officer Sepulveda, when respondent opened his wallet, Officer Graeber saw in plain view, a small folded packet of cocaine, 1/2 inch by 1 and 1/2 to 2 inches, commonly known as a pony pack. Officer Sepulveda was standing directly next to respondent and his partner Graeber. Although Officer Sepulveda did not see the drugs first, he saw his partner reach into respondent's wallet and saw the pony pack of cocaine as it was removed from the wallet. Officer Sepulveda was present when the pony pack was open. He saw that the pack contained white powder, which he and his partner suspected to be cocaine.

Clearly, Officer Sepulveda's testimony, which was based primarily on direct observations and partially on hearsay testimony, sufficiently provides probable cause to arrest respondent. His personal observations corroborate the hearsay testimony concerning his partner's observations. The Illinois Appellate Court unquestionably used a stringent and technical standard of proof when it applied hearsay rules to prevent the application of the collective knowledge doctrine. As a result, the Appellate Court transformed the collective knowledge doctrine into an unworkable principle of law that does not comply with this Court's interpretation of the Fourth Amendment probable cause concept. The People respectfully urge this Court to take the present opportunity to cure the erroneous precedent that was established by the Illinois Appellate Court.

II.

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE IMPOSED WHERE ARRESTING OFFICERS REASONABLY RELIED ON POLICE HEADQUARTERS' RADIO DISPATCH TO STOP RESPONDENT, WHO WAS THEN SEEN TO POSSESS AN ILLEGAL SUBSTANCE IN PLAIN VIEW; AND WHERE HEADQUARTERS AS A *WHOLE* HAD PROBABLE CAUSE TO ARREST.

Assuming, *arguendo*, adoption of a more restrictive interpretation of the collective knowledge doctrine and a finding of a violation of the Fourth Amendment, the People of the State of Illinois request that this Court expand the "good faith" exception to the exclusionary rule to instances where a law enforcement agent reasonably and objectively relies on a directive from police headquarters to seize a suspect; and where the headquarters, as a whole, possesses sufficient facts to justify the seizure, even though the details of such information were not known or fully communicated to the arresting officers. The Illinois Appellate Court refused to impute the knowledge of the investigating officers to the arresting officers, and thus held that the arresting officers lacked probable cause to arrest respondent. Since the Appellate Court's decision was not based on a finding of unlawful police misconduct, the exclusion of otherwise reliable evidence does not fulfill the deterrent purpose of the exclusionary rule.

It is well established that the exclusionary rule is a judicially created remedy adopted by this Court to enforce the Fourth Amendment right of citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." How-

ever, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in *all* proceedings or against *all* persons." (emphasis added) *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976). The exclusionary rule operates as a deterrent for police misconduct. *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). As observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182 (1974):

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

Significantly, the rule has been prudently "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348, 94 S.Ct. at 620.[11] Specifically, the rule "has been limited to

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[11] The following cases limit the rule's application to the trial itself: *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974) (This Court refused to extend the rule to grand jury proceedings.); *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) (This Court held that the exclusionary rule was not extended to forbid the use, in federal civil proceedings, of evidence illegally obtained by state officials since the likelihood of deterring unlawful police conduct was not sufficient to outweigh the social costs imposed by the exclusion.); *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d

(continued...)

cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police conduct." *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 3413, 82 L.Ed.2d 677 (1984).[12] Based on this rationale, this Court in *Leon* adopted a "good faith" exception to the exclusionary rule. In essence, this Court determined that the Fourth Amendment exclusionary rule should not bar the use of evidence obtained by police officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but was

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[11] (...continued)
559 (1954) (where this Court refused to bar the use of illegally seized evidence for the purpose of impeaching a defendant who testifies on his own behalf.); *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975) (where this Court declined to adopt a *per se* rule or "but for" rule that would make inadmissible any evidence which comes to light through a chain of causation that began with an illegal arrest.); *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978) (where this Court determined that testimony from a live witness may be admitted, notwithstanding that the testimony derived from a concededly unconstitutional search.); *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) (exclusion is not mandated when law enforcement agents act in good faith reliance upon a statute or ordinance that is subsequently held unconstitutional); also see, *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Wong Sun v. United States*, 371 U.S. 471, 491-492, 83 S.Ct. 407, 419-420, 9 L.Ed.2d 441 (1963); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

[12] In *United States v. Peltier*, 422 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1975), this Court stated that "if the purpose of the exclusionary rule is to deter unlawful police misconduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

ultimately found to be invalid. *Leon*, 104 S.Ct. at 3411-22.

In the instant case, the Illinois Appellate Court held that the People failed to show the source of the information which caused the dispatcher to send the arresting officers to look for respondent, and that because Officers Sepulveda and Graeber were not acting in concert with Detective O'Meara, that the information gleaned by Detective O'Meara could not be imputed to the arresting officers to provide them with probable cause to arrest. The Appellate Court also held that an officer who sees contraband in plain view must testify, and that his partner may not offer hearsay evidence as to what the first officer saw. The Appellate Court's decision is in no way based on any unlawful police misconduct. The failure to produce the dispatcher or source of the radio dispatch does not amount to any illegality on the part of the police officers who seized respondent. Nor does the Appellate Court's reliance on the hearsay rule to bar the plain view exception indicate any misconduct on behalf of the arresting officers. Thus, it cannot be said that the arresting officers had any knowledge that respondent's seizure could be unconstitutional under the Fourth Amendment. Thus, there is no unlawful police misconduct to be deterred in the instant case.

Moreover, the record establishes the legality of respondent's seizure. The Chicago Police Department did possess sufficient evidence to warrant respondent's arrest on the day he was seized. The information that respondent was wanted had been developed by Detective Timothy O'Meara who had spoken to Raymond Kurecki, a close friend of the victim. Mr. Kurecki informed the

police that Mr. McHugh had been robbed by respondent and two others. (R. 90) Mr. Kurecki knew respondent personally, and had been told by the victim that one of the people who had robbed him was "Tony" who used to work for him. Mr. Kurecki provided the police with the information about respondent's car, including a license plate number. Detective O'Meara ran the plate and knew that the owner of the car was Anthony Crane. Detective O'Meara obtained a photograph of respondent and showed it to Mr. Kurecki, who made a positive identification of respondent as the person he knew as "Tony," whom the victim had named as the person who committed the robbery. There is no question that these facts rise to the level of probable cause which would authorize a detached and neutral magistrate to issue a warrant for the offense of robbery.

Since there was no unlawful police misconduct and the Chicago Police Department possessed sufficient information to justify respondent's seizure, the exclusion of the otherwise reliable evidence would only serve to deter objectively reasonable law enforcement activity. Therefore, the People of the State of Illinois respectfully request that this Court apply the good faith exception to the exclusionary rule in the instant case.

III.

WHERE A MOTION TO QUASH AND SUPPRESS EVIDENCE, DENIED IN THE TRIAL COURT, IS LATER OVERTURNED ON APPEAL BY A REVIEWING COURT, THE STATE SHOULD BE ENTITLED, AS A MATTER OF LAW, UPON REQUEST, TO A HEARING ON ATTENUATION REGARDING ANY EVIDENCE WHICH WOULD OTHERWISE BE EXCLUDED.

In addition to its decision that the People of the State of Illinois lacked probable cause to arrest respondent, the Illinois Appellate Court also held that the record on appeal did not prove that the confession was attenuated from the taint of the allegedly illegal arrest. Further, the Illinois Appellate Court refused to remand this case for a hearing on attenuation.

When a reviewing court overturns a trial court's finding that the arresting officers had probable cause to arrest under the Fourth Amendment, a reviewing court's refusal to remand the cause for a hearing on attenuation is a mechanical application of the exclusionary rule that was *not* envisioned by this Court. The exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976). Since the exclusionary rule is a judicially created remedy aimed at deterring unlawful police misconduct, the rule has been "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). As a result, this Court declined to adopt a *per se* or "but for" rule that would make inadmissible any evidence which surfaces through a chain of

causation that began with an illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975).

Because the goal of deterrence will not always be served by excluding relevant but illegally obtained evidence, this Court has found certain situations in which exclusion of the evidence is not required. Among these situations is one where the causal connection between the allegedly illegal conduct and the acquisition of the challenged evidence is so attenuated that the taint of the unlawful act is dissipated. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). This Court set forth three criteria which courts may consider in determining whether the taint of an illegal arrest has been purged: (1) the lapse of time between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the illegal conduct. *Brown*, 95 S.Ct. at 2261-2262.

Wong Sun and *Brown* reveal that the analysis of a Fourth Amendment claim naturally entails a two-step process: (1) an inquiry of whether a Fourth Amendment violation exists; and, if one does exist, (2) an inquiry of whether application of the exclusionary rule constitutes the appropriate remedy. Both cases presume that the State will be permitted to present evidence of attenuation, if such evidence exists. In the context of the appellate level, a reviewing court's reversal of a finding of probable cause *and* denial of the State's request for a remand in order to conduct an attenuation hearing is a dissension of this Court's interpretation of the Fourth Amendment and nonmechanical application of the ex-

clusionary rule. The State of Illinois should be entitled to present evidence within the criteria of *Brown v. Illinois* to show that the taint of an allegedly illegal arrest has been attenuated.[13]

The decision of the Illinois Appellate Court, that defendant's confession was not attenuated from his arrest, was based solely on the facts in the record on appeal. By failing to remand the case for a hearing on attenuation, the Illinois Appellate Court has denied the State the opportunity to preserve a vital piece of evidence, respondent's confession. If allowed to stand, the decision would require the People to present evidence of attenuation in every case, whether a defendant's motion to suppress is allowed or denied, on the off chance that it might be needed at some future time. The additional time spent on attenuation hearings in cases where motions to quash and suppress are denied, which in most cases would prove to be unnecessary, would perforce do great damage to the orderly execution of justice and cause great delay in the progress of trials.

This Court has never addressed whether the State is entitled as a matter of right, upon request, to have a case remanded for the purpose of an attenuation hearing. In

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[13] In *Brown*, this Court declined the suggestion that the case be remanded for further factual findings because the record contained sufficient detail and depth from which to determine whether Brown's statements were purged from the taint of the illegal arrest. 95 S.Ct. at 2262. Significantly, the State of Illinois did not request such a remand, instead, the United States, as *amicus curiae*, suggested that the cause be remanded for further factual findings. 95 S.Ct. at 2262. Contrary to *Brown*, in this case, the People of Illinois requested the remand for a hearing on attenuation.

cases where a defendant's motion to suppress was denied at the trial level, but the ruling was subsequently overturned on appeal, the State should in every case be given the opportunity to preserve its evidence. A contrary holding transforms the exclusionary rule into an overly mechanical rule that serves only to suppress relevant and reliable evidence.

In sum, the State of Illinois merely asks this Court to rule that in cases where a motion to quash arrest and suppress evidence, denied in the trial court, is later overturned on appeal by the appellate court, that the State is then entitled as a matter of law, upon request, to a hearing on attenuation with regard to any evidence which would otherwise be excluded by the ruling of the appellate court. The State of Illinois requests that this Court direct the Illinois Appellate Court to order a remand of this case for the purpose of a hearing to determine if intervening factors attenuated respondent's statements from his allegedly tainted arrest.

CONCLUSION

Petitioner, the State of Illinois, respectfully requests that this Honorable Court grant the petition for a writ of certiorari filed in this matter. Alternatively, the State of Illinois respectfully requests that this Honorable Court summarily remand and order the Appellate Court of Illinois to remand the matter to the trial court to conduct an attenuation hearing to determine whether the taint of the allegedly illegal arrest was attenuated at the time of respondent's confession.

Respectfully submitted,

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APPENDICES

APPENDIX A

FIFTH DIVISION
May 28, 1993

No. 1-91-1328

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ANTHONY CRANE,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
The Honorable Themis Karnezis, Judge Presiding.

MODIFIED ON DENIAL OF REHEARING

JUSTICE MCNULTY delivered the opinion of the court:

After a jury trial, defendant Anthony Crane was found guilty of aggravated arson and first degree murder and sentenced to natural life imprisonment. On appeal, we consider: (1) whether there was probable cause to arrest defendant; (2) whether the trial court properly instructed the jury; (3) whether the prosecutor made improper comments during closing argument which denied defendant a fair trial; and (4) whether the trial court abused its discretion when it sentenced defendant to natural life imprisonment.

The evidence at trial revealed that on October 15, 1989, defendant and his friend Jim Valek were at William McHugh's tavern when they decided to steal the cash register. Defendant and Valek split the money recovered from the cash register. The following day, defendant and Valek sold the register to a woman named Janette.

After learning that he was a suspect in the robbery which occurred at McHugh's tavern, Valek bought the cash register back from Janette and threw it in the river at Kedzie and 37th Street.

On October 17, 1989, there was a fire at McHugh's tavern and William McHugh died as a result of injuries he received in the fire. When defendant was arrested on October 31, 1989, and questioned, he initially denied any knowledge of the stolen cash register. Defendant was questioned a second time and admitted that he had taken the cash register. He was then asked about the fire and denied any knowledge. During a third conversation, defendant admitted to being present at the time of the fire but stated that it had been an accident. On November 1, 1989, defendant was interviewed by an assistant State's Attorney and signed a handwritten statement. In the statement, defendant admitted that after hearing rumors that he was suspected of stealing the cash register, he went to McHugh's tavern and told McHugh that he did not steal the cash register. Defendant testified that McHugh did not believe him and slapped him in the face. Defendant stated that he pushed McHugh, who fell to the floor and spilled gas on himself.

The argument over the cash register continued as McHugh lay on the floor. Defendant lit a cigarette and then threw the match down near McHugh. McHugh immediately ignited and defendant ran home.

When defendant testified at trial, he denied any knowledge of the fire or the murder of William McHugh. Defendant admitted that he stole the cash register, but claimed that the statement he made was a lie. He claimed he lied because he was afraid that the police officers were going to beat him.

Defendant's first contention is that the trial court erred when it denied defendant's motion to quash arrest and suppress evidence since his warrantless arrest was effected without probable cause. He claims the State did not establish that the dispatcher possessed sufficient facts to direct the arresting officers to act, and that the subsequent plain view seizure of narcotics from defendant was not sufficiently proved.

At the suppression hearing, defendant testified that on October 31, 1989, as he was leaving Jim Valek's apartment at 3045 West 60th Place, he saw a police officer. The officer (who did not identify himself to defendant) asked defendant if his car was blocking the alley. Defendant said that it was. The officer asked defendant for identification. Defendant pulled out of his wallet the ticket that he was driving on. The officer and his partner then frisked and handcuffed him. The officers then took defendant to Valek's apartment, searched the apartment and found a cocaine seal in the coffee table drawer. Jim Valek also testified that the officers found the cocaine seal in the coffee table drawer.

Officer Sepulveda testified that on October 31, 1989, he and Officer Graeber received an assignment from their dispatcher to look for a man wanted for robbery and arson murder. The man was described to the officers by the dispatcher as a white male, driving a blue station wagon with no front fenders. The dispatcher directed the officers to the area of 3150 West 64th Place. When the officers were unable to locate defendant's vehicle at that address, they continued their search until they located the car at 3045 West 60th Place. The officers put the car under surveillance and waited for the driver to return. Jim Valek informed the officers that the car was defendant's and that he would get him. When defendant came into the hallway, the officers asked for his driver's license. Officer Sepulveda testified that when defendant opened his wallet, Officer Graeber observed a small folded packet of cocaine. Officer Graeber did not testify and Officer Sepulveda did not see the packet until Graeber began removing it from defendant's wallet. The officers then searched Valek's apartment but did not recover any other drugs.

Detective O'Meara testified that on October 17, 1989, he was assigned to investigate the arson and homicide that occurred at McHugh's tavern. O'Meara spoke with Raymond Kurecki, who was a friend of McHugh. Kurecki told O'Meara that he had a conversation with McHugh shortly after the robbery. McHugh told Kurecki that one of the people who took the cash register was "Tony," the man who used to work for McHugh. Kurecki told O'Meara that he thought the person McHugh was referring to was Anthony Crane. O'Meara testified that

Kurecki told him that he knew Anthony Crane and that Crane drove a blue Datsun station wagon with a front fender missing. Kurecki later identified a photograph of defendant. After learning that defendant lived at 3045 West 60th Place, O'Meara went to that address on October 30 and 31, but he did not find defendant or the car. O'Meara testified that he never discussed his investigation with anybody else on the police force.

Based on this testimony, we find that the police lacked probable cause to arrest defendant. When officers are working in concert, probable cause can be established from all the information collectively received by the officers even if that information is not specifically known to the officer who makes the stop. (*People v. Fenner*, (1989), 191 Ill. App. 3d 801, 584 N.E.2d 147.) Although an arresting officer may rely upon a dispatch to make an arrest even if he is unaware of the specific facts that established probable cause to make the arrest, the State must demonstrate that the officer who directed the dispatch to be issued possessed facts sufficient to establish probable cause to make the arrest. *People v. Crowell*, (1981), 94 Ill. App. 3d 48, 418 N.E.2d 477.

Here, it is clear that O'Meara was not working in concert with the arresting officers on the investigation into the robbery or arson at McHugh's tavern. While O'Meara had knowledge that defendant may have been involved in the robbery of McHugh's tavern, he testified that he never told anybody he was looking for defendant, he did not direct anybody to arrest defendant, and he was not working with the officers who arrested defendant. Fur-

thermore, there is no evidence in the record as to the source of the dispatcher's information. It is clear, however, that the information did not come from O'Meara in light of O'Meara's testimony that he did not tell anybody about the information he possessed on defendant's connection with the crimes. The State argues that the cause and origin report filed by O'Meara stating that the fire was an arson imputes the arresting officers and the dispatcher with knowledge that defendant was a suspect in the arson and the police report on file in the 8th police district imputes them with knowledge that defendant was a suspect in the robbery. These two reports on file at two separate locations within the Chicago police department did not provide probable cause to arrest defendant, particularly because there is no evidence that arresting officers or the dispatcher who directed the officers to look for defendant knew of the existence of these reports. Furthermore, even if they did read these reports, there is no evidence that the cause and origin report identified defendant as the possible arsonist or that the report on file in the 8th district did anything more than state that one of the possible robbery suspects was named Tony.

Nor does the evidence provided here establish that the police had probable cause to arrest defendant for possession of a controlled substance. The seizure of evidence under the plain view doctrine requires that: (1) the object seized is in plain view; (2) the officer views the object from a position where he has a right to be; and (3) the facts and circumstances known to the officer at the time he acts give rise to a reasonable belief that the items seized constitute evidence of criminal activity. (*People v.*

Montgomery (1980), 84 Ill. App. 3d 695, 405 N.E.2d 1275.) What constitutes probable cause for a seizure must be determined from the standpoint of the officer who made the seizure, with his experience and training in the detection of controlled substances being taken into account. *People v. Stout* (1985), 106 Ill. 2d 77, 477 N.E.2d 498.

The evidence presented at the suppression hearing does not establish that the cocaine packet was in plain view when it was seized since Graeber, the officer who made the seizure, did not testify at the suppression hearing. Officer Sepulveda was not competent to testify about what the seizing Officer Graeber observed at the time of the seizure. Accordingly, there is no evidence in the record as to whether the packet was in Graeber's plain view when it was inside the wallet or what led Graeber to believe that the packet contained cocaine. Sepulveda's testimony cannot be relied on to establish plain view because he did not see the packet until after Graeber began removing it from defendant's wallet.

When a confession is obtained from a defendant through custodial interrogation after an illegal arrest, that confession must be suppressed unless the State can establish that intervening events have broken the causal connection between the illegal arrest and the confession so as to render the confession an act of free will. (*People v. Thomas* (1984), 123 Ill. App. 3d 857, 463 N.E.2d 832.) Whether attenuation has been established may be determined by considering whether *Miranda* rights have been given and understood, the time between the arrest and

confession, and the presence of intervening circumstances, such as an appearance by the defendant before a magistrate. (*Thomas*, 123 Ill. App. 3d 857, 463 N.E.2d 832.) The State requests that we follow *People v. Booker* (1991), 209 Ill. App. 3d 384, 568 N.E.2d 211, and remand this case for an attenuation hearing. However, under the circumstances of this case, an attenuation hearing is unnecessary. The State has given us no indication of what additional evidence they are capable of adducing on remand to establish that the arrest and statement were attenuated. Rather, the State insists that the record here is more than adequate to establish attenuation. From this record we conclude that although defendant was given *Miranda* warnings several times, neither the length of time nor intervening circumstances dissipated the taint of defendant's illegal arrest. Therefore, we find that because the trial court improperly denied defendant's motion to suppress his statement, this case must be remanded for a new trial.

Defendant next maintains that the trial court erred in instructing the jury to consider, first, whether the State had proven defendant guilty of aggravated arson; second, whether defendant has been proven guilty of felony murder; and third, whether defendant has been found guilty of the two other first-degree murder charges. Then, if defendant is found not guilty of all the other charges, the jury was instructed to consider whether defendant was guilty of involuntary manslaughter. Defendant now contends that this instruction unduly emphasized the first degree murder charges over the involuntary manslaughter charge. At the instruction conference, however, de-

fense counsel admitted that there was no pattern jury instruction specifically addressing this situation. Both the State and defendant tendered instructions that instructed the jury to first consider the first-degree murder charge. The court found that both instructions covered the same items, but that the State's instruction was easier for the jury to understand. Although defense counsel objection to the State's instruction, defense counsel's objection was based on the argument that his tendered instruction was clearer and not on the basis that the State's instruction unduly emphasized the more serious charges over the less serious one. Under these circumstances, defendant has waived his right to appeal the issue of the content of the instruction.

Defendant next contends that the prosecutor made improper comments in closing argument concerning the charge of involuntary manslaughter. Defendant first takes issue with the prosecutor's comment that:

> "Involuntary manslaughter, folks is a reckless act. It's like a car accident. That's for car wrecks. It's an involuntary act."

Defense counsel objected to this comment, but his objection was overruled. The prosecutor in *People v. Gutirrez* (1990), 205 Ill. App. 3d 231, 564 N.E.2d 850, also argued that recklessness was equivalent to accident. The court found the prosecutor's comment improper since recklessness and accident are not synonymous. We reach the same conclusion here.

Defendant also alleges error in the prosecutor's characterization of second-degree murder as "something a little less than first degree murder * * * a lower offense." An objection to this argument was sustained. The prosecutor then argued that after the jury rejected second degree murder, it had "to go a step farther" and consider involuntary manslaughter. Defense counsel's objection to this comment was also sustained. We agree with defense counsel that it was improper to apprise the jury of the comparative severity of the defendant's possible sentence. (See *Gutirrez*, 205 Ill. App. 3d 231, 564 N.E.2d 850 (the prosecutor's reference to involuntary manslaughter as "the lowest class of felony" was improper since the purpose of this comment was to imply that an involuntary manslaughter verdict would result in negligible punishment for the defendant as compared to first-degree murder).) We therefore find that the prosecutor's comments were improper and should not be repeated at the new trial on remand.

Because we are remanding this case for a new trial, we do not consider whether the trial court, in sentencing defendant to natural life imprisonment, failed to consider defendant's rehabilitative potential.

Accordingly, for the reasons set forth above, this case is reversed and remanded for a new trial.

Reversed and remanded.

GORDON, P.J. and MURRAY, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
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October 6, 1993

Hon. Jack O'Malley
State's Attorney Cook Co., Crim Appeals Div.
309 Richard J. Daley Center
Chicago, Illinois 60602

No. 75648 - People State of Illinois, petitioner v. Anthony Crane, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1993.